legislation of Luitprand, interspersing them with somewhat jaunty illustrations and occasionally with references to the other Germanic codes. The indications of advancing civilization are pointed out with considerable cleverness, but the impression of legal principles is blurred by a pervading incapacity to say the thing which needs saying at the right moment. Of course we have to hear about the English jury system and the *sacramentales* or fellow-swearers, but we doubt if any one would be much the clearer for this comparison. One would suppose that the *sacramentalis* was expected to know the facts of the case, and would certainly get the idea that the whole theory of the trial by *sacramentum* rested upon the power of one juror to break the deadlock which Dr. Hodgkin assumes as the natural condition of a Lombard trial. The really essential thing — the peculiar Teutonic conception of evidence — is left quite out of sight.

As to the religious conditions of the Lombards, we are given but little suggestion of the momentous change from Arianism to Catholicism. The obscurity of our sources leads Dr. Hodgkin to assume that religion was a matter for which the Lombards, unlike any of their Germanic relatives, had little or no interest, and he goes so far as to say that "probably" neither the counsellors of King Agilulf, nor "perhaps" the king himself, knew whether he was Arian or orthodox! It is a thankless task to point out these defects in the work of a man so sincere, so learned, and so diligent; but really one cannot open the book anywhere without being nettled by decorations which do not embellish but only confuse and mislead. This is not sound scholarship. It is amateurish from beginning to end. The traces of accurate historical method are only a surface, beneath which we constantly perceive the good, old-fashioned literary man, who writes history as an elegant accomplishment.

*The History of English Law before the Time of Edward I.* By Sir FREDERICK POLLOCK, M.A., LL.D., Corpus Professor of Jurisprudence in the University of Oxford, and FREDERIC WILLIAM MAITLAND, LL.D., Downing Professor of the Laws of England in the University of Cambridge. (Cambridge. Boston: Little, Brown and Co. 1895. Two vols., pp. xxxviii, 678, xiii, 684.)

The book before us is by two Cambridge men. Of Sir Frederick Pollock we need not speak. He is well known in this country and, besides, he tells us in a note to the preface that "by far the greater share of the execution," by which he says he means the actual production of the book, "belongs to Mr. Maitland," who holds the chief professorship of law in that university. Mr. Maitland's historical turn of mind, so marked in everything he has written, first found expression, if we are not mistaken, in his *Gloucestershire Pleas of the Crown* (1883). Taking his work altogether, from the Gloucestershire Pleas to and including the History, we

do not hesitate to say that in Mr. Maitland we have the learning and the intimacy with the *fontes* of Brunner; shall we add, that we have further what we find in Sohm — Brunner has never done anything so brilliant as the *Procedure of the Salic Law* — the gift which men call genius? We must be temperate; but there are chapters and parts of chapters in this work in which there is penetration not found in ordinary books of history. The chapter on Roman and Canon Law is masterly; so is the one on the age of Bracton. Of detailed examination presently.

In style the book is fresh, ready, almost conversational. To one who knows Mr. Maitland it is his living voice, or at least his epistolary pen. Perhaps one may be inclined to think, now and then, that the writer is playing with a rather stately subject; but the objection would not be pressed very far.

The work is divided, unequally in point of bulk, into two books, preceded by a short introduction, itself a good piece of work. Book I. is entitled "Sketch of Early English Legal History"; Book II. "The Doctrines of English Law in the Early Middle Ages." That is, Book I. deals with history in the direct sense of the forces which make for the state of things seen in Book II.; while Book II. accordingly is a book of law written after its day. The central feature of the whole work is, roughly speaking, the Angevin period, or from the middle of the twelfth to the last quarter of the thirteenth century — from Henry II. to Edward I.

The Angevin period is sufficiently well marked to justify the authors in treating it by itself. When it opens the time is ripe for the distinct advances of Henry the Second; advances in legal procedure rather than in substantive law, which is the characteristic feature of the period, whether the steps taken were forward or backward. At the other end of the period, the reign of Edward the First is the beginning of modern law, in the sense that modern law can now be recognized. From that time on the question of development, leaving out of sight such tracts of law as bills of exchange, was only a matter of details. The Angevin was, indeed, a period of transition — what period is not? — but it was a period of transition which was to end with a body of law, however roughly formed, for all generations to come down to the present day. We count it one of the merits of this book that that fact is brought out with clearness and followed out with courage and self-restraint.

How has the plan of the work been wrought out? In one word, thoroughly. A running commentary, or gloss, on certain texts of the first volume must serve to indicate more particularly our answer, a gloss here and there somewhat special, in the hope that it may be helpful, in some small way, to teachers and students. We have noted many passages for comment. The following may be selected: —

The first subject for comment is, to our mind, the most important of all, for it concerns the very conception of law. On page 175 — all our references are to the first volume — and on other pages before and after, the authors are speaking of new methods of procedure, the writs by which

cases were, and to this day are, set on foot. They say ". . . it became apparent that to invent new remedies was to make new laws." True enough, as it happened, but why should the inventing of new remedies be the making of new laws? The answer involves, it seems to us, the true conception of law. If law is a mandate given by some external sovereign, then new remedies may well be new laws; the mandate may as well prescribe law indirectly as directly. And with all the simplicity of twelfth and thirteenth century civilization — it really was simple if you only understand it — as compared with nineteenth, with all the iteration and reiteration of the customs of the realm, this was to a greater extent than appears on the surface the working conception of law, unconsciously more than in later times but none the less truly. "The king is the fountain of justice" runs through the whole administration of the law, the king, too, in a very personal sense; "sicut nos et honorem nostrum ac vestrum et," that is, further, "commodum regni nostri diligitis," fail not, was the familiar language of writs. This was but the Roman doctrine, to which it all runs back. Laws and arms are all one to the Roman emperor; he must be decorated with arms, he must have a quiverful of laws. "Imperatoriam majestatem," runs the preface to the *Institutes*, "non solum armis decoratam, sed etiam legibus oportet esse armatam."

But we are beginning to see the matter in another light. The courts are beginning to act upon the theory that law is only the *nexus* or *lex*, which binds together the members of the state. With that conception remedies take on a new aspect; to adopt new remedies suited to that idea of law is not *per se* to make new laws — it is but an incident of the existence of law. So it would have been in the thirteenth century with a clear regard to what law is; the invention of new writs, to fulfil the needs of the relations, or again the *nexus* or *lex*, between man and man, would not have given cause for the outcry of the Provisions of Oxford (*History of Procedure*, 198, note), an outcry to be followed by the half-abortive statute which gave to the Chancery the right once more to issue new writs, though only "in consimili casu." A right conception of law in the time of Henry the Third, with the courage and independence to act accordingly, would have prevented any "hardening" of writs at that time, and might have saved English jurisprudence centuries of reproach. Far from being the mere handmaiden, procedure has, from the beginning until our day, been tyrant of the law; law has bent before it in fetters, waiting long the day of emancipation. But even with a sound theory of procedure, law would still have been in fetters with the Roman idea prevailing of the external lawgiver. Procedure has only been a mesne tyrant.[1]

At the end of a note on page 176 a remark is made to the effect that

[1] We do not object to the notion of an external lawgiver, if that lawgiver will find the law entirely in the relations deemed necessary to hold society together on the basis of equal rights. Our criticism is based upon the fact that this lawgiver will not only make law instead of finding it existent, but will not allow his servants ample freedom to find it, on the ground that in so doing they may usurp his rights.

the chancellor's authority over the king's wards — in the main, his own tenants in chief, heirs under age — was administrative rather than judicial. Such instances as the following may be noticed in the same connection: Edward the First commands his uncle, William of Valence, one of the foreigners of the troublesome train of Eleanor of Provence, to deliver up to Humphrey de Bohun (heir of the late Earl of Hereford and Essex), who, the king declares, is of full age, his castle and manor of Haverford, of which the said Humphrey's mother, whose heir he is, died seised. (*Plac. Abbrev.* 262, 1 Edw. I.) It is not likely that the king would have given to his chancellor as yet the power to adjudicate away rights of his of such value as wardships, without a particular commission *pro hac vice.*

Pike's *History of the House of Lords* may be read with profit in connection with what the authors say on pages 176, 177 of the king in council. (Pike, pp. 43, 47, 51.) The name of the tribunal, as Mr. Pike finds it, is the Court of the King in his Council in his Parliament, a cumbersome name, but accurately descriptive. In the Rolls of Parliament the judicial business of this court appears to have been largely given to deciding whether petitions brought before it for justice, not otherwise forthcoming, were presumptively well founded, relief to be given, if the answer of the council was favorable, in the tribunal to which the petitioner is now sent. So our authors correctly put it; but Mr. Pike as correctly states that "there," that is, in the council, "doubts respecting judgments were determined, there new remedies were established for new wrongs, and there justice would be awarded to every one according to his deserts"; to all of which Pollock and Maitland would no doubt agree, assuming that the last clause was to be taken with some limitations.

What the authors say on page 221 of English charters, or deeds as we should now call most of them, expressing the good of the donors' souls as the motive of the act, may be seen again abundantly in wills. Scarcely a will of importance can be found that did not make gifts to religion, for the soul of the testator, generally also for the souls of his family, and then "for all Christian souls."

A striking picture of the growth and decay of military service in its old lines will be found on page 231. Decay closely followed growth. Before the system of knights' fees of the twelfth century[1] is fully developed, its insufficiency is apparent, and scutage comes into play, only itself to become antiquated in turn, even in the reign of Edward the First; "when Edward I. is on the throne the military organization which we call feudal has already broken down, and will no longer supply either soldiers or money save in very inadequate amounts."

At the close of an interesting paragraph on the size of the knight's fee (p. 236), the authors say that "It is conceivable that at times a vague theory prevailed according to which twenty librates of land or thereabouts, that is, lands to the annual value of £20, would be the proper provision

[1] It is not to be inferred that the authors intimate that knight-service was not of the time of the Conqueror, as it was.

for a knight; but even this is hardly proved." As this is a subject which Mr. Maitland has made his own, and doubtless Sir Frederick Pollock also, one cannot doubt even a doubt of the kind without hesitation. We shall not then challenge the doubt, but there are documents which on their face lend support to the view that £20 annual value of lands constituted a knight's fee. Cases like the following are not uncommon in the book of Parliamentary Writs, the great storehouse of materials for the history of the reigns of Edward the First and Edward the Second: —

Henry de Bohun, returned by the sheriff of Somerset and Dorset as holding land or rents to the amount of £20 yearly value and upwards, and as such summoned under the general writ to perform military service. (25 Edw. I.) Such records, however, do not prove much, especially when records like the following, of the same time, are to be found: Joan de Bohun, returned for the counties of Sussex and Surrey as holding lands or rents to the amount of £40 and upwards yearly, and as such summoned under the general writ, etc. (25 Edw. I.) So Henry de Bohun (28 Edw. I.), and other cases. But what shall be said of the following? We quote from Parl. Writs, I. 214; Rot. Claus. 6 Edw. I., m. 8, d.: —

The king to the sheriff of Gloucestershire: "Precipimus tibi firmiter injungentes quod omnes illos de balliva tua qui habent *viginti libratas terræ vel feodum unius militis integrum valens viginti libras per annum*, et de nobis tenent in capite et *milites esse debent* et non sunt, sine dilatione distringas ad arma militaria. . . . Distringas etiam sine dilatione omnes illos de balliva tua qui habent viginti libratas terræ vel feodum *unius militis* integrum valens viginti libras per annum de quocumque teneant et milites esse debent et non sunt," etc.

Writs of the same tenor were sent to all the sheriffs of England, from which it is apparent that no local custom is referred to. Then, coming down nineteen years later, we find such writs as the following, of May 5, 1297; Parl. Writs, I. 281; Rot. Claus. 25 Edw. I. m. 26, d.: —

The king to the sheriff of Yorkshire: ". . . tibi precipimus . . . scire facias omnibus illis de balliva tua infra libertates et extra qui habent viginti libratas terræ et redditus per annum, et illis similiter qui plus habent, viz. tam illis qui tenent de nobis in capite quam illis qui non tenent, ut de equis et armis sibi provideant," etc. And writs of like tenor to this also were sent to the sheriffs very generally, and also to the justiciar of Cheshire; though it should be added that in the November preceding, a writ to the justiciar of Cheshire had made requisition for that country on the basis of thirty librates. "Quia volumus," said the king then, "quod omnes et singuli de comitatu Cestrensi qui habent *triginta* libras per annum in comitatu illo et alibi in regno nostro et milites esse debent et non sunt armis militaribus decorentur," etc.; proclamation through the county to be made accordingly.

This is not all the evidence by any means; but even if all the rest should be equivocal, it could hardly destroy the effect of the two writs of the sixth and the twenty-fifth years of Edward the First, above quoted.

For these two years, at least, a "theory prevailed according to which twenty librates of land" constituted a knight's fee.

On the point that military service was due as of the land and not as of personal relation (pp. 239, 240), the two writs just referred to furnish a gloss. Whether the persons in question hold of the king or "de quocumque teneant," they are to perform military service for the king. The same writs illustrate the compelling of men to become knights, to which the authors refer on page 395 and elsewhere.

On page 283 we are referred to the great case of the earls of Gloucester and of Hereford, mentioned later in this review, in regard to private warfare; and we are referred to the fact that both parties were punished by imprisonment as showing the seriousness of the offence of disobeying the king, for the king had, by express mandate, commanded the earls to desist from their hostile purposes. But was not the mulct inflicted, rather than the imprisonment, which was of short duration, the more striking evidence of the nature of the offence of contempt? The Earl of Gloucester was mulcted in 10,000 marks; the Earl of Hereford, as being less guilty, in 1000 marks. That is something like saying that the former was required to pay $750,000, and the latter $75,000 in money of to-day.

Of the consequences of marrying a ward of the king without the king's consent, spoken of on page 301, a parallel case in regard to "kings' widows" may be found in the king's own household, the household of Edward the First. Joan of Acres, the king's eldest daughter, — now widow of the Earl of Gloucester just named, and so doubly bound to the king, — falls in love with a gallant but untitled courtier of her late husband's train, Ralph Monthermer, not even a knight, and, probably because the king would not consent to such a match, was married to him privately, without the knowledge of her dread father. Monthermer was committed to prison and his lands were seized by the king; and as for the Princess Joan, enough is known of Edward the First to make it probable that her honeymoon was not all that she could have wished.

The Rolls of Parliament afford an excellent gloss to what is said on page 302 in regard to wardship in socage by the mother of an heir. "When the dead tenant in socage," say the authors, "left a son and a widow, the widow would have the wardship of her son and of his land." In the second or third year of Edward the Second, Agnes, widow of Renaud de Frowyk, petitions the council for justice, for that certain persons had carried off and put into the castle of Plessy, Henry, son and heir of the said Renaud, who was tenant in socage of his lands, and had kept him there by force until he was married against his will and the peace of the king, and to the great damage of the said Agnes. The answer of the council was, "habeat [Agnes] breve in suo casu ordinatum," referring to the famous statute of 13 Edw. I. in relief of actions; and the meaning was, that she was to have the right to try the case in the King's Bench or the Common Pleas, and if she proved her allegations there she would be entitled to judgment.

"Let him bear the wolf's head" is a phrase, we are told on page 459, "in use even in the thirteenth century." It is certainly older than the thirteenth century. In the so-called Laws of Edward the Confessor it is declared of one who has broken the peace of the church, that if he cannot be found within thirty days plus one, the king shall outlaw him; and then "lupinum caput geret . . . quod ab Anglis *uuluesheved* nominatur." See *History of Procedure*, 349, note; and see the page preceding for some remarks on outlawry on all fours with the text, page 459, of the work under notice.

A great deal is suggested by a paragraph of but four lines on page 527, especially in the remark in regard to the "liberty that men enjoyed of regulating, by private bargains, what we might deem matters of public law." The idea of the state is far from developed even at the end of the thirteenth century. Private jurisdiction of life and property is rooted in a past in which it was unquestioned; the state has been able to make its way but slowly from the first, and still it halts half-way; crimes are but gradually disengaging themselves from torts — the individual is but gradually losing the right to inflict punishment as well as to require compensation for offences; private warfare breaks out almost in the family of so great and enlightened a king as Edward the First — between the husband of his eldest and the father of one who, not many years after, is to become husband of his youngest daughter; jurisdiction over property and life is still an appurtenance to lands and tenements — men buy and sell it and give it away.

How far the times in question are from modern methods may be seen in the striking picture concerning courts, on page 535. "The suitors were the doomsmen"; and "when there is a trial in the king's court, the king demands a judgment from the assembled prelates and barons." See, also, pages 87, 577. It would be easy to gloss such passages from records of litigation of the time. We hope it will not be thought irrelevant to adduce an illustration from the poetry of the twelfth century. The noble epic called the *Song of Roland* was written about the beginning of the reign of Henry the Second, by a Norman who lived, or had lived, it seems, in England. Who he was is not known, but he was well informed in the law. The trial of Ganelon for the betrayal at Roncesvalles, which the poet sets forth in minute detail, shows the fact. The men of Charlemagne's court

where

> Assemblet sunt ad Ais a la capele,
> cumencet li plaiz e les nuveles
> De Guenelun, ki traïson ad faite.

The emperor orders the prisoner brought before him, and

> "Seignurs baruns," lur dist Carles li reis,
> "De Guenelun kar me jugiez le dreit."

And the reason now appears, we may safely infer, why the emperor

does not act as judge; he himself makes the accusation — in technical language the emperor himself appeals Ganelon, and he must not act as judge in his own cause, a reason applicable to every case in which a court is held by a lord interested in its proceedings, whether directly or indirectly. The cause of the emperor proceeds; Ganelon pleads, as we should say, in mitigation; then, not Charlemagne, nor Charlemagne and his barons, but

Respundent Franc: "A cunseill en irum."

They now retire accordingly to consider of their judgment, as is shown by what follows. But Charlemagne will have no half-way measures if he can help it; there is to be no dropping of the case by judgment of court; and when certain of the barons, a majority, perhaps, return to give answer and "pray"

Que clamez quite le cunte Guenelun,

the king cries out,

"vus estes felun."

Still, far from taking the case into his own hands even when his barons are "felun," he is only depressed in spirits; he calls himself miserable;

A l'doel qu'il ad si se cleimet caitifs.

The upshot of it all is, that on the demand of Thierry, who now stands forth from among the barons and, in vigorous language, demands judgment, as champion of the emperor,

Respundent Franc: "Or avez vus bien dit,"

and the duel is awarded and waged between him and Pinabel, champion of Ganelon. Thierry wins the fight.

"A detached portion of a parish lying ten miles away from the main body is by no means an unknown phenomenon" (p. 549) will give the student of New England history the right to say that history will repeat itself, that such things were of the commonest in this part of the world during the entire period of our church establishment. An instance in the last century may be noted, "of which," to appropriate the language of a note to the foregoing passage, "the present writer has some knowledge." By an order in council in 1773, Gershom Bigelow and others of the town of Sutton, Worcester County, Massachusetts, with their families were, without change of residence, for ecclesiastical purposes "erected into a separate precinct" called the South Worcester parish; while the bounds of Sutton remained unchanged (for some five years). Gershom Bigelow was geographically and politically of Sutton, but he was also ecclesiastically, that is, by law, with all that the term ecclesiastically then meant, of another place; an island of "homestalls" in Sutton paid tribute to South Worcester.

Speaking of what in the margin of our history (p. 570) is well called "high justice," the authors remind us of the "gradually ascending scale"

of jurisdictional rights in the baronage; there are Chester and Durham, and there are "lordships which are almost palatinate," among which "the marcherships of the Welch border are . . . splendid instances." Brecknock and the parts near by afford an instance which found its way into the Rolls of Parliament. Humphrey de Bohun, Earl of Hereford and Lord of Brecknock, a marquis in fact before the title had come to be conferred in England, and others interested with him as lords marchers of Wales, bring their complaint before the council that the king's officers are infringing their franchise. "No writ of the king runs there," they could proudly say, and craved judgment of the council accordingly. The council considered that there was ground for the petition, and gave the usual direction. Rot. Parl., II. 90 (1335).

An interesting fact, which the authors do not explain, is mentioned on page 574. Speaking of manorial jurisdiction over personal actions, it is stated that this probably arose out of the feudal relationship between man and lord; but replevin (the process by which a tenant brought in question the validity of a distress levied upon his goods by his landlord) is an exception. That remedy "is regarded as royal and few lords claim to entertain it." The statute of Malicious Distresses in Courts Baron, which may have some connection with the modern action for malicious prosecution of civil demands, may be noticed here. It is of the year 1284, and quite supports our authors. At the same time it tells us how it came to pass that replevin was of royal, whereas trespass, for instance, was of manorial jurisdiction. "If any be attached," runs the statute, upon groundless and malicious complaints, "he shall replevy his distress so taken, and shall cause the matter to be brought afore the justices" — that is, the king's justices in eyre — "before whom, if the sheriff or other bailiff, or lord, do avow the distress lawful," the cause shall now proceed in the royal court. The statute was, apparently, part of the general scheme for bringing property within the king's jurisdiction.

A little further on we come to a long discussion of the nature of the township. The township is a commune or communitas. There, with Martin Luther, the authors take their stand; they will no further go; corporation it is not. We might say something in regard to New England townships, but we refrain. The English township is marchland for law and political economy; the question of its nature is no doubt important, but as for us, with Doomsday to bear us out more or less, "vasta est tota." Let the militant economists have it, and let Thorold Rogers — but he is dead.

MELVILLE M. BIGELOW.

*The Tribal System in Wales, being a part of an Inquiry into the Structure and Methods of Tribal Society.* By FREDERIC SEEBOHM, F.S.A. (London and New York: Longmans, Green and Co. 1895. Pp. ix, 238. Appendices and index, pp. 101.)